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Allstate Insurance Company v. Dixon Wong : Brief of Appellant

Utah Court of Appeals

Lynn S. Davies; Richards Brandt Miller & Nelson; Attorney for Appellee.
Preston Handy; Siegfried & Jensen; Daniel F. Bertch; Kevin R. Robson; Berth Robson; Attorneys for Appellant.

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

ALLSTATE INSURANCE COMPANY,

Petitioner/Appellee,

v.

DIXON WONG,

Respondent/Appellant.

CASE NO. 20030072-CA

BRIEF OF APPELLANTS

Appeal from a Judgment of Third Judicial District Court
of Salt Lake County, State of Utah
Honorable William Bohling

Lynn S. Davies (0824)
RICHARDS BRANDT MILLER & NELSON
50 South Main Street, 7th Floor
Salt Lake City, Utah 84110-2465
Attorney for Petitioner/Appellee Allstate Insurance Company

Preston Handy (6239)
SIEGFRIED & JENSEN
5664 South Green Street
Murray, UT 84123

Daniel F. Bertch (4728)
Kevin R. Robson (6976)
BERTCH ROBSON
1996 East 6400 South Suite 100
Salt Lake City, Utah 84141
Attorneys for Respondent/Appellant Wong

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Murray, UT 84123

Daniel F. Bertch (4728)
Kevin R. Robson (6976)
BERTCH ROBSON
1996 East 6400 South Suite 100
Salt Lake City, Utah 84141
Attorneys for Respondent/Appellant Wong

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JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to U.C.A. §§78-2-2(3)(j)(2001). The Utah Court of Appeals has jurisdiction pursuant to a pour-over order. U.C.A. §§78-2a-3(2)(j)(2001).

ISSUES ON APPEAL

The following issues are presented on appeal:

1. Did Allstate waive its right to assert a policy limitation on the arbitrator's award by failing to either introduce the policy before the arbitrator, or to obtain an agreement in the arbitration agreement to reduce recovery to a stipulated amount?
2. Did the trial court err by considering extrinsic evidence, in the form of an adjuster's affidavit and a declarations sheet, to impeach the amount of the arbitrator's award?

Both these issues arise out of a successful petition by Allstate Insurance to modify an arbitrator's award. This Court reviews *de novo* the trial court's modification of the arbitration award, granting "no deference to the district court's conclusions of law but review them for correctness." *Pacific Development, L.C. v. Orton*, 2001 UT 36, ¶6; 23 P.3d 1035, 1037 (Utah 2001); *Central Florida Inv. v. Parkwest Associates*, 2002 UT 3; 40 P.3d 599, 604 (Utah 2002).

A trial court's review of an arbitration award is very limited and restricted to the "statutory grounds and procedures for review." *Intermountain Power v. Union Pacific R.*, 961 P.2d 320, 322 (Utah 1998); *Pacific Development*, 2001 UT 36, ¶6, ¶12; 23 P.3d at 1039. The trial court should have reviewed the arbitration award only to determine whether the arbitrator exceeded his powers by making an award on a claim not submitted to arbitration by the parties in their agreement.

Intermountain Power, 961 P.2d at 325.

DETERMINATIVE STATUTES AND RULES

In this case, the trial judge relied on U.C.A. §§78-31a-14(1985) and U.C.A. §§78-31a-15(1985).[1] They read in pertinent part:

> (1) Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears . . .
> (c) the arbitrators exceeded their powers. [78-31a-14(1)].
>
> * * *
>
> (1) Upon motion made within 20 days after a copy of the award is served upon the moving party, the court shall modify or correct the award if it appears: . . .
> (b) the arbitrator's award is based on a matter not submitted to them . . . ." [78-31a-15(1)].

STATEMENT OF THE CASE

1. Nature of the Case

This is an appeal from a judgment of the Hon. William Bohling, Third District Court, in favor of Allstate Insurance, Wong's underinsured motorist insurer, modifying an arbitrator's award of $321,000.00 in Wong's favor, to $100,000.00.

2. Course of Proceedings and Disposition in the Court Below

Respondent Wong was injured in an accident with an underinsured motorist. Wong had underinsured motorist coverage from Petitioner Allstate. Wong and Allstate agreed to arbitrate Wong's claim for underinsured motorist benefits. An arbitrator awarded $321,000.00 in favor of

[1] The Arbitration Act that the trial judge relied on was repealed, effective May 15, 2003.

Wong. Allstate then petitioned the Third District Court to modify the award to $100,000.00. This petitioner was granted, and the award modified to $100,000.00. Wong appeals, seeking reinstatement of the arbitrator's award.

3. Statement of Relevant Facts on Appeal

The Accident and Wong's Injuries

On June 1, 2001, Dixon Wong ("Wong") sustained serious injury in an automobile accident. (R.48). The driver of the other car was entirely at fault. (R.50). Wong suffered a shattered heel bone, lacerations to the leg and face, chip fracture to his elbow, and multiple other lacerations, bruises, and abrasions. (R.50). As a result of injuries sustained, Wong incurred $32,576.84 in medical expenses. (R.51). Wong's shattered heel bone will require future surgeries costing approximately $22,000. (R.51). His injuries cost Wong lost income totaling approximately $14,800. (R.51). His injuries also rendered him partially crippled with chronic pain, impairment of movement, and scarring. (R.52).

The Disputed Underinsured Motorist Claim

Wong filed an underinsured motorist claim under his insurance policy with Allstate Insurance Company ("Allstate"). (R.6). Allstate denied his claim, and disputed the amount payable to Wong under his underinsured motorist coverage. (R.6). After some negotiation, the parties mutually agreed to submit the dispute to binding arbitration. (R.48). Even though an arbitrator would eventually value Wong's claim at over $320,000.00, for five months, Allstate refused to offer more than $30,000 to settle the claim, less than one-tenth of the total value of Wong's claim. (R. 44). On the day before the arbitration hearing, Allstate Insurance increased its offer to $70,000.00.

Drafting And Signing The Arbitration Agreement

Allstate and Wong, through their attorneys, signed two agreements, an "Arbitration Agreement" and a "Binding Arbitration Agreement " (R 47, 49) There was no indication that this arbitration was pursuant to any policy provision, instead, it appears that the arbitration was a purely voluntary resolution between the parties The Arbitration Agreement, as originally drafted by Allstate, included a "high/low" agreement, stipulating a $100,000 limit on any arbitration award (R 47) **Wong's attorney lined out the proposed high/low stipulation, the portion of the agreement that limited the arbitrator's award to $100,000.00. He then signed, and returned the agreement to Allstate. (R. 47, 48). Allstate's attorney signed the amended agreement, with the high/low agreement placing the $100,000.00 limit on the arbitrator's award, stricken out. (R.48)** The arbitration agreement did not prohibit either party from entering evidence as to the limits of the policy On March 18, 2002, Allstate and Wong, through their attorneys, signed the Binding Arbitration Agreement, defining the dispute as "Underinsured Motorist Claim – Damages " (R 49)

In a letter written **after** the arbitration agreement was signed, but **before** the arbitration, Allstate's and Wong's attorneys disputed the effect of Wong's insurance policy limits on a potential arbitration award (R 57, 58) Wong's attorney believed that the agreement was that the arbitrator was not bound by any policy limit (R 57) Wong's attorney, in his letter date May 14, 2002, stated that "[w]e had agreed that the arbitrator will not be made aware of either the terms of the Arbitration Agreement or the policy limits under the subject policy " (R 57) Allstate's attorney, in response, admitted that "I agree with you that there is not a high/low agreement in place regarding the upcoming arbitration in this matter " (R 58) Allstate's attorney disagreed with Wong's attorney, stating that the arbitrator's award would only be paid up to the policy limits of Wong's insurance

policy (R 58) The letter also expressed that Allstate would settle the claim for $70,000 (R 58) Despite the obvious difference of opinion as to the effect of the arbitration agreement, Allstate Insurance proceeded with arbitration anyway, without seeking judicial relief by way of an action for declaratory relief, reformation or for rescission Arbitration started the next day, May 16, 2002 (R 50)

The Arbitration Award

On May 20, 2002, the arbitrator, Warren Driggs, decided in favor of Wong and awarded a gross award of $321,616 85 (R 52) The award was reduced for liability coverage and P I P benefits previously paid, resulting in a net award amount of $260,926 84 (R 52) The Arbitrator based his "findings and conclusions" on the medical opinion of a doctor, the "credible testimony" of Wong and his wife, the arbitrator's own observations, written evidence submitted by both parties, and the arguments of the lawyers (R 50, 51) Critically, Allstate did not assert its claim that the Wong policy limited recovery to $100,000 00 to the arbitrator, as a matter of affirmative defense, set-off, limitation or otherwise Nor did Allstate submit the policy or declarations page to the arbitrator

Allstate's Petition to Modify or Vacate the Award

Allstate did not ask the arbitrator to reduce the award to $100,000 00 Allstate did not submit the question of whether there was an agreement to reduce the award to $100,000 00 to the arbitrator Instead, Allstate directly petitioned the Third District Court to modify or vacate the award because the award exceeded the policy limits under Wong's insurance policy (R 83) However, **Allstate did not introduce the underinsured motorist insurance policy in this proceeding either**, but instead, only submitted a declarations sheet, via an affidavit of an adjuster, Dan Filler (R 13-14, 19-25) The

declarations sheet merely states "$100,000.00 per person . . . $300,000.00 per accident". No other extrinsic evidence was submitted to the Court by Allstate Insurance.

The court found that the underinsured motorist policy constituted a contract that defined the outer limits of exposure to Allstate. (R.142). (Again, the policy was never introduced into evidence). Consequently, the judge modified the arbitration award to $100,000, the purported policy limit for Wong's underinsured motorist coverage. (R.143). Specifically, the court held that the "insurance policy limits of $100,000 constitute a contractual determination of the parties, which are not modified or altered by virtue of the arbitration agreement." Id. According to the district court, the arbitrator exceeded his authority by granting an award beyond the reasonable expectations of the parties because the award exceeded the insurance policy limit. Id. In addition, the court concluded that the arbitrator's award was without foundation in reason or fact. Id.

SUMMARY OF ARGUMENT

The arbitration agreement showed a clear removal of the proposed $100,000.00 limitation on the arbitrator's award. If that was a mistake, Allstate should have sought relief from the courts to reform, or rescind the contract. Instead, Allstate conceded that there was no "high/low" agreement in the arbitration agreement itself. Further, Allstate did not introduce the policy, with its purported limitation of $100,000.00, to the arbitrator. The district court erred in modifying the arbitration award to, in effect, bail out Allstate's prior mistakes in handling the arbitration.

The method the trial court used to modify the arbitrator's award was improper because the court used the extrinsic evidence to impeach the arbitrator's award. The court did not explicitly find ambiguity in the arbitration agreement. Even so, the trial court did not have the insurance policy in

front of it, nor any evidence of the intent of the attorneys who drafted and signed the arbitration agreement. If there was an ambiguity in the arbitration agreement, the trial court erred by not construing it against the drafter, Allstate, and in finding that there was sufficient evidence to modify the arbitrator's award. The court should have interpreted the scope of the agreement from the words of the agreement and confirmed the arbitrator's award.

Finally, the arbitrator's award was not without foundation in reason or fact because the arbitrator construed the arbitration agreement in a reasonable and rational manner, and made an award based solidly on the evidence before him.

II. Allstate waived its right to challenge the award for exceeding a policy limit by not arguing this affirmative defense in arbitration. Allstate and Wong neither stipulated to policy limits in their arbitration agreement nor did Allstate assert the effect of policy limits during arbitration. The trial court erred in allowing Allstate to present an affirmative defense in a petition to modify or vacate the award.

III. Finally, Wong should be compensated for the expenses he incurred, including attorney fees, due to Allstate's manipulation of the arbitration process. Allstate's actions ensured a judicial review of the award.

ARGUMENT

I. ALLSTATE WAIVED ITS RIGHT TO LIMIT THE ARBITRATOR'S AWARD BY FAILING TO SUBMIT ITS POLICY TO THE ARBITRATOR, OR BY FAILING TO AGREE WITH WONG TO LIMIT THE ARBITRATOR'S AWARD.

It is clear from the record that there was no agreement to limit the award to policy limits. See Point Two, infra. However, the Court need not reach that argument, because Allstate waived its right to assert any policy limitations defense.

There are two ways to handle the issue of policy limits, assuming that one wanted to so limit the award. The parties could either have including language in the arbitration agreement, limiting the award to a set amount; or, Allstate could have submitted the policy and its limits for the arbitrator to consider as part of the arbitration. Allstate did neither.

First, Allstate agreed to an arbitration agreement that specifically removed language limiting the arbitrator's award. Having failed to address the issue in the arbitration agreement as written in this case, it was then incumbent on Allstate to present the matter by way of evidence before the arbitrator. Allstate did present other evidence to limit or reduce the award. It submitted the amount of the recovery from the third-party tortfeasor's insurance ($50,000.00), which the arbitrator used to reduce his award. Allstate also submitted evidence of the No-Fault benefit amount paid to Wong, which, again, the arbitrator used to reduce the award. There was no contractual or legal reason why Allstate could not have submitted the policy itself, to the arbitrator, to further limit the award.

Allstate had a duty to bring all relevant materials to the attention of the arbitrator, especially matters of set-off or limitation. U.C.A. §§78-31a-7(2)(1985). It simply failed to submit the policy and its limits to the arbitrator. Its failure to do so waives its right to complain later. *Zimmerman v. Illinois Farmers Ins. Co.*, 739 N.E.2d 990 (Ill. App. 2000)(arbitrator presumed to have considered amount of set-off for recovery from third-party tortfeasor in underinsured motorist arbitration pursuant to policy; court could not consider affidavit to impeach award). It was certainly error for the trial court

to bail out Allstate by incorporating the insurance policy into the arbitration agreement, to construct one master agreement that included the insurance policy limits. This was especially problematic since the policy was never introduced before it.

Finally, if there was an issue about the scope of the arbitrator's duties, Allstate could have petitioned the district court for an order determining those duties: U.C.A. §§78-31a-4(1)(1985) specifically provides that "**[i]f an issue is raised concerning** the existence of an arbitration agreement or **the scope of the matters covered by the agreement**, the court shall determine those issues and order or deny arbitration accordingly." (Emphasis added.)

A series of recent Colorado cases illustrates the correct application of these principles in a way that preserves the integrity of the arbitration and judicial review process. In *Kutch v. State Farm Mut. Auto. Ins. Co.*, 960 P. 2d 93 (Colo. 1998), the Colorado Supreme Court held that an insurer which failed to seek judicial review of an arbitrator's award in excess of policy limits waived the right to contest that award, and could not defend a proceeding to collect the award by reference to the policy limits.

Next, in *Farmers Ins. Exchange v. Taylor*, 45 P.3d 759 (Colo. App. 2001), the Colorado Court of Appeals distinguished *Kutch*, and rejected a blanket rule requiring trial judges to modify all arbitrated underinsured motorist insurance claim awards to fit within policy limits. *Taylor*, 45 P.3d at 763. The court explained that, in *Kutch*, "the arbitration provision limited the arbitrable issue to whether the insured was entitled to collect damages from the uninsured owner or driver, and the amount of those damages." Id. In *Taylor* however, "the underinsured motorist benefit payable to the insured was specifically arbitrable and was submitted to arbitration." *Taylor*, 45 P.3d at 762-763.

Therefore, "the policy limits and setoff amounts were affirmative defenses to the insurer's obligation to pay benefits to the insured" Id at 762 As such, they should have been presented during arbitration and not brought up in an attempt to modify the arbitration award Id The court explained that "parties to an arbitration are obligated to present all relevant arguments, defense, and evidence during the arbitration" *Taylor*, 45 P 3d at 762 The *Taylor* court clearly stated that the "policy limit was an affirmative defense to the insurer's obligation to pay benefits" Id As a result, the *Taylor* court affirmed the trial court's confirmation of the award and rejected the insurer's policy limit argument because "the arbitration clause in this matter does not state that the Arbitrator is to determine the amount of payment subject to the policy limitations" *Taylor*, 45 P 3d at 762 The court quoted with approval the trial court's reasoning that "in light of the fact that the Arbitrator in this matter was not presented with the policy limitations prior to or during the arbitration hearing and the absence of any language qualifying the Arbitrator's power to determine the amount of payment within the arbitration clause, the Arbitrator had jurisdiction to determine the amount of payment that should be made, without qualification" *Taylor*, 45 P 3d at 760-761

Finally, in *Applehans v. Farmers Insurance Exchange*, 68 P 3d 594 (Colo App 2003), the court refined the approach used in *Taylor* The *Applehans* court held that if "there was no stipulation regarding policy limits [then] the trial court should confirm the initial award in favor of plaintiff" in excess of policy limits Id at 601 "However, if the court finds that the parties had stipulated to be bound by policy limits, to apply a setoff, and not to submit those issues to the arbitrator, the court must vacate the arbitrator's initial award to the extent that it exceeds the policy

limits and ignores the setoff."[2] Id.

Since Allstate was on notice before the arbitration began that Wong did not understand the arbitration agreement to limit the arbitrator to the policy limits, it was bound to bring its dispute over the application of the policy limits to the court, to the arbitrator's attention during arbitration, or to be deemed to have waived this affirmative defense. *Applehans*, 68 P.3d at 599. Otherwise, excuse of Allstate's "procedural defaults . . . would undermine the use of arbitration as a method of resolving disputes efficiently, conclusively, and comprehensively." *Taylor*, 45 P.3d at 763.

II. THE TRIAL COURT ERRED BY CONSIDERING EXTRINSIC EVIDENCE TO CONCLUDE THAT THE ARBITRATOR HAD EXCEEDED HIS AUTHORITY.

An arbitrator's award may be set aside for exceeding his authority when his decision violates either one of the two prongs in the *Buzas* test: either (1) the "arbitrator's award covers areas not contemplated by the submission agreement" or (2) the award was "without foundation in reason or fact." *Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941, 950 (Utah 1996).

A. THE NET ARBITRATION AWARD OF $260,926.84 WAS WITHIN THE CONTEMPLATION OF THE SUBMISSION AGREEMENT.

Arbitration "is a remedy freely bargained for by the parties and provides a means of giving effect to the intention of the parties, easing court congestion, and providing a method more expeditious and less expensive for the resolution of disputes." *Cade v. Zions First Nat. Bank*, 957 P.2d 1073, 1076-1077 (Utah App. 1998) ("Arbitration is a matter of contract and a party cannot be

[2] In a related Colorado case, an arbitrator was informed of the policy limit and refused to modify the award to conform to the policy limit. *Swan v. American Family Mut. Ins. Co.*, 8 P.3d 546 (Colo. App. 2000). The court held, under those circumstances, that the award could be vacated

required to submit to arbitration any dispute which he has not agreed so to submit [because] . . . a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of the dispute."). An arbitration agreement gives the arbitrator authority to conclusively resolve a dispute. *Buzas*, 925 P. 2d at 950 ("It is . . . fundamental that the authority of the arbitrator springs from the agreement to arbitrate."). The arbitration agreement also defines the scope of the dispute, and thereby "the scope of the arbitrator's authority." *Pacific Development*, 2001 UT 36, ¶9; 23 P.3d at 1038.

When interpreting terms of an arbitration agreement, including its scope, a reviewing judge should first look to the arbitration agreement. *Intermountain Power*, 961 P.2d at 325. ("[T]he arbitrator deduced the parties' contractual intent directly from the language of the Agreement. This is as it should be."). When determining whether an arbitrator went beyond the scope of an arbitration agreement, "the parties' intentions are controlling, and the parties' intentions should be determined from the words of the Agreement." Id.; *CFI*, 2002 UT 3, ¶12; 40 P.3d at 605; *Reed v. Davis County School Dist.*, 892 P.2d 1063, 1065 (Utah App. 1995). A judge may only look beyond the four corners of an arbitration agreement when the terms of the agreement are ambiguous. *Intermountain Power*, 961 P.2d at 325; *Farmers Ins. Exchange v. Taylor*, 45 P.3d at 761 (Colo. App. 2001); *Pacific Development*, 2001 UT 36, ¶9; 23 P.3d at 1039; *Reed*, 892 P.2d at 1065.

If ambiguities in an arbitration agreement exist, they are construed against its drafter, especially "when . . . the ambiguity could have easily been avoided." *Docutel Olivetti v. Dick Brady Systems, Inc.*, 731 P.2d 475, 479 (Utah 1986). Ambiguities in an arbitration agreement should also "be liberally interpreted" to expand the scope of arbitration. *Docutel*, 731 P.2d at 479 ("If the scope

of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration "), *Lindon City v. Engineers Construction Co.*, 636 P 2d 1070, 1073 (Utah 1981)

Wong and Allstate, through their attorneys, signed a contract to arbitrate a dispute over damages that Allstate should pay to Wong (R 48, 49) There is no evidence in the record of any prior agreement to submit this issue to arbitration, neither the law nor a prior agreement compelled the parties to submit the claim to arbitration *Cade*, 957 P 2d at 1076-1077 The insurance policy did not require arbitration Either party could have submitted the dispute to a court Instead, they gave up their right to trial and agreed, for consideration, to the generally less costly option of submitting their dispute to binding arbitration *Cade*, 957 P 2d at 1067-1077

Allstate, in particular, had an inducement to enter binding arbitration, even one without a high/low agreement For months, Allstate had offered substantially less than Wong's damages were worth and could face a bad faith lawsuit *Billings v. Union Bankers Ins. Co.*, 918 P 2d 461, 468 (Utah 1996) Rather than risk a suit for breach of implied good faith, with potential liability far exceeding a $100,000 policy limit, Allstate submitted all of the issues surrounding Wong's claim to arbitration without the safety net of a high/low stipulation *Billings*, 918 P 2d at 468, *Taylor*, 45 P 3d at 761

The district court should have determined the scope of the arbitrator's authority under the arbitration agreement from the language of the agreement itself *Intermountain Power*, 961 P 2d at 325, *Pacific Development*, 2001 UT 36, ¶9, 23 P 3d at 1039 The instant that the trial court looked at the affidavit of an Allstate adjuster, and a declarations page, it was reaching beyond the arbitration agreement Further, the court did not explicitly find any ambiguity in the arbitration contract The

court could not have reasonably found ambiguity, given the fact that the high/low agreement was clearly lined out. (R.48-49). Because the contract contains no stipulation to limit a potential award; the award was not limited by a stipulation not bargained for by the parties. *Taylor*, 45 P.3d at 761. It could have been limited by the evidence before the arbitrator; but it was not proper for the trial court to receive additional evidence and to conform the award to that additional evidence. The trial court erred in looking beyond the arbitration agreement to interpret the parties' intentions regarding the scope of their submission. *Pacific Development*, 2001 UT 36, ¶9-12; 23 P.3d at 1039; *Intermountain Power*, 961 P.2d at 325; *Taylor*, 45 P.3d at 761.

If courts are allowed to use extrinsic evidence to interpret unambiguous arbitration agreements, every arbitration award potentially related to another contract would be subject to re-litigation, contrary to public policy. *Pacific Development*, 2001 UT 36, ¶11; 23 P.3d at 1039; *Taylor*, 45 P.3d at 762. Such extrinsic challenges to arbitration awards would damage confidence in the arbitration process and discourage claimants from seeking an arbitrated resolution, contrary to clear public policy in Utah. *Allred v. Educators Mut. Ins. Ass'n of Utah*, 909 P.2d 1263, 1265 (1996).

If the scope of the arbitration was unclear, the court should have erred on the side of inclusion and allowed the arbitrator to determine the proper award, regardless of policy limits. *Docutel*, 731 P.2d at 479. In addition, any ambiguity should be construed against Allstate, the drafter of the agreement. Id. Allstate had the opportunity to bargain for the inclusion of a limit on the award, or in the alternative, to take the dispute to trial. *Cade*, 957 P.2d at 1076-1077. The arbitration agreement did not in any way preclude Allstate from submitting the policy and declarations page of Wong's policy to the arbitrator. Allstate did not, and the arbitration agreement did not include a limit

on recovery; the parties' intentions should be determined from the explicit exclusion of a term limiting the award. *Intermountain Power*, 961 P.2d at 325.[3]

B. THE ARBITRATOR'S AWARD WAS NOT WITHOUT FOUNDATION IN REASON OR FACT

The *Buzas* court set up the "irrationality test" to determine whether an arbitrator exceeded his authority. 925 P.2d at 950. The test for determining irrationality is "whether reasonable minds could agree that the award was not possible under a fair interpretation of the evidence." Id. This test must be applied in light of the evidence actually before the arbitrator, not in light of additional evidence not before the arbitrator, submitted by a losing party in a petition to modify to the trial court. In *Buzas*, the court cautioned that "courts must approach this allegation cautiously," and "an arbitrator has not exceeded his authority unless the award is completely irrational." 925 P.2d at 950; *Intermountain Power*, 961 P.2d at 322 ("Whether a court agrees with the arbitrator's judgment is irrelevant, as long as the arbitrator construed and applied the contract in an arguably reasonable manner and acted fairly and within the scope of his authority.").

Though the trial court disagreed with the arbitrator's award, the arbitrator presented ample explanation to show that he rationally based his decision on the evidence presented by the parties. (R.50); *Buzas*, 925 P.2d at 950; *Intermountain Power*, 961 P.2d at 322. The arbitrator carefully noted the injuries suffered by Wong, which included a "right calcansus fracture . . . one of the worst injuries that trauma patients sustain . . . the single most disabling fracture that people have in the

[3]Allstate urged upon the trial court cases where the agreement to arbitrate actually was contained in the same insurance agreement containing the policy limits, *St. Bernard v. DAIIE*, 350 N.W.2d 847 (Mich. App. 1984); *Allstate Ins. Co. v. Cook*, 519 P.2d 66 (Ariz. 1974), or which appeared to require arbitration in the policy, *In Re Mele*, 604 N.Y.S.2d 619 (App.Div. 3d Dept. 1993). This was apparently not the case here.

lower extremity in terms of the ability to maintain gainful employment throughout their career." (R..26). The arbitrator also noted that Wong suffered a "left lower leg laceration and scar . . . chip fracture in his elbow . . . facial abrasions and lacerations [which] are still visible to me . . . left hand/fingers are still tingling . . . headaches two to three times per week . . . numerous scars over various parts of his body." (Id.). The arbitrator carefully broke out the award for special damages into special damages of $71,616.85, and general damages of $250,000.00. (R. 28). The general damages were only slightly more than three times the special damages awarded. There was an ample, even compelling basis for the arbitrator to award the amount he did.

Further, the arbitrator fairly interpreted the authority granted to him by the parties. *Intermountain Power*, 961 P.2d at 322. The arbitration agreement did not constrain the amount of damages that the arbitrator could award. The Binding Arbitration Agreement submitted a dispute over damages that should be awarded on an underinsured motorist insurance claim. (R.49). An arbitrator could fairly interpret from this agreement the authority to award damages he deemed appropriate for Wong's injuries. *Buzas*, 925 P.2d at 950; *Soft Solutions v. B.Y.U.*, 2000 UT 46, ¶17-18, ¶34; 1 P.3d 1095, 1100. The arbitrator obviously interpreted the arbitration agreement to allow him to consider matters of set-off and limitation, for he allowed a set-off of $60,926.84 to his gross award. Given the arbitrator's treatment of the case, he cannot be said to have misunderstood that he could receive and give effect to matters limiting the award, such as policy limits. The trial court simply substituted its own judgment for the award of the arbitrator to bail out a party who negligently

failed to introduce relevant matters at the arbitration hearing.[4]

III. IN ADDITION TO THE ARBITRATION AWARD, WONG SHOULD RECEIVE AN AWARD OF ATTORNEY FEES

U.C.A. §§78-31a-16(1985) provides, in part:

> Costs incurred incident to any motion authorized by this chapter, including a reasonable attorney's fee, unless precluded by the arbitration agreement, may be awarded by the court.

The awarding of attorney fees in judicial contests over arbitration awards "promote[s] the public policy of encouraging early payment of valid arbitration awards and discouraging nonmeritorious protracted confirmation challenges." *Buzas*, 925 P.2d at 953. The "basic purpose of attorney fees is to indemnify the prevailing party . . . ." *Softsolutions*, 1 P.3d at 1107. Utah's arbitration acts reflect a "longstanding public policy favoring speedy and inexpensive methods of adjudicating disputes." *Intermountain Power*, 961 P.2d at 325; *Taylor*, 45 P.3d at 762 (Arbitration is meant as a "method of resolving disputes efficiently, conclusively, and comprehensively."). "Confidence in the finality" of the arbitration process and discouraging of "piecemeal litigation" is vital to the policies underlying the arbitration process. *Taylor*, 45 P.3d at 762.

Allstate's own actions ensured "protracted confirmation challenges" by its 'wait and see' approach. *Buzas*, 925 P.2d at 953. Allstate knew it had a dispute on its hands over whether the policy limits would apply, yet it chose to wait and see what the outcome of the arbitration was before acting. The confirmation battle over this arbitration award is a direct result of Allstate's errors in the

[4] Allstate introduced a red herring in attacking the award, by claiming that the arbitration agreement could not modify the insurance policy. However, the question is not modification of the insurance contract, but enforcement of the arbitration contract and award.

arbitration process. Allstate failed to either bargain for a limiting stipulation on an arbitration award or contest the effect of policy limits during arbitration. Rather, Allstate counted on a judicial review of the arbitration as an 'escape hatch,' should the arbitration award exceed Allstate's unstipulated and undisclosed policy limits. Given the magnitude of Wong's injuries, an award greater than the policy limits was a near certainty. (R.50). Wong should be compensated for reasonable expenses, including attorney fees, he incurred due to Allstate's manipulation of the arbitration process. *Softsolutions*, 2000 UT at ¶54-56; 1 P.3d at 1107; *Buzas*, 925 P.2d at 953.

CONCLUSION

Allstate signed an arbitration agreement without a stipulation limiting the award. Allstate sat on its affirmative defense of policy limits and later regretted its decision to take a chance on arbitration without stipulating to, or submitting insurance policy limits. If Allstate's mistakes are excused, confidence in the finality of the arbitration process would suffer and claimants would be discouraged to enter arbitration agreements with insurance companies.

The district court erred in modifying the arbitration award because the court used the extrinsic evidence of an adjuster's affidavit asserting an insurance policy limits defense. Allstate and Wong contracted, for consideration, to submit their dispute over damages payable to binding arbitration. The arbitration agreement unambiguously excluded any limitation on the arbitrator's award. The court did not explicitly find ambiguity in the arbitration agreement. The court should have interpreted the scope of the agreement from the words of the agreement.

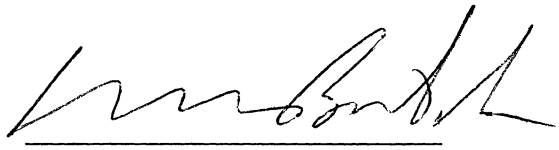
Even if the scope of the arbitration was ambiguous, the court should have, under Utah law, interpreted the agreement liberally to include the arbitrator's award. In addition, any ambiguity in the

arbitration agreement should be construed against Allstate, the drafter of the agreement.

Allstate waived its right to challenge the award for exceeding a policy limit and the trial court erred in allowing Allstate to present an affirmative defense in a petition to modify or vacate the award. Allstate and Wong neither stipulated to policy limits in their arbitration agreement nor did Allstate dispute the effect of policy limits during arbitration. Allstate had an obligation to present affirmative defense, including the existence of a policy limit, during arbitration.

Finally, Wong should be compensated for the expenses he incurred, including attorney fees, because of Allstate's manipulation of the arbitration process. Allstate neither bargained for a limiting stipulation in the agreement nor contested the effect of policy limits during arbitration. Allstate's failure to take action ensured a judicial review of the award. The order modifying the arbitration award should be reversed with a direction to deny the petition to modify.

DATED this 7 day of August, 2003.



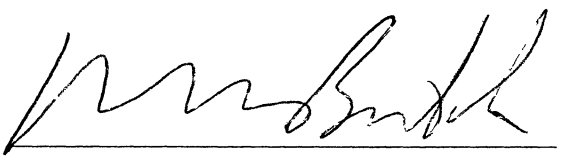
Daniel F. Bertch
Attorney for Respondent/Appellant Wong

CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of August, 2003, I served a true and correct copy of the foregoing RESPONDENT/APPELLANT'S BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

Lynn S. Davies (0824)
RICHARDS BRANDT MILLER & NELSON
50 South Main Street, 7th Floor
Salt Lake City, Utah 84110-2465
Attorney for Petitioner/Appellee Allstate Insurance Company

Preston Handy (6239)
SIEGFRIED & JENSEN
5664 South Green Street
Murray, UT 84123
Attorney for Respondent/Appellant Wong



ADDENDUM

A
Arbitration Agreement

ARBITRATION AGREEMENT

The parties, by and through their attorneys, hereby agree and consent to the following arbitration agreement:

A. The arbitration of this case shall be decided by a mutually agreed upon arbitrator.

B. The arbitration shall be binding, and the parties will thereafter be bound by the decision of the arbitrator and waive any rights of appeal, except as provided under Utah law.

C. Discovery shall be conducted in accordance with Utah Rules of Civil Procedure. Depositions may be taken of parties, witnesses and experts any time prior to 10 days before the arbitration hearing. If medical depositions cannot be so scheduled, they may be taken at any time prior to the hearing. Requests for production of documents and interrogatories may be served. Medical, employment, PIP, and school records authorizations shall be provided to counsel for respondent. Counsel for respondent will provide copies of any documents received to counsel for claimant, with counsel for claimant paying reasonable copying expenses.

D. No record need be made of the proceedings.

E. The matter may be presented informally by proffer or either party may elect to present testimony through recorded or sworn statements.

F. The arbitrator is not to be bound by strict adherence to legal procedures or the rules of evidence applicable to judicial trials.

G. In the arbitration proceeding medical evidence may be submitted in the form of medical records and/or medical reports. Physicians need not be present at the hearing, although the parties reserve the right to present such testimony live.

H. The parties will simultaneously file position papers with the arbitrator at least three business days prior to the proceeding. Copies shall be served at the same time upon all counsel involved.

I. ~~The parties agree to be bound by a high/low agreement with a high of $100,000.00 and a low of $0.00~~. The terms of ~~this high/low~~ agreement shall not be disclosed to the arbitrator.

J. The fees of the arbitrator and the administration fees shall be paid in equal shares by the parties.

K. The parties, through their counsel, acknowledge and accept the advice of their counsel in entering into this agreement, and understand and agree that they are thereby waiving any right they have to pursue formal legal action on any and all claims, demands, either past or future, causes of action both for property and bodily injury damages, costs, expenses, or compensation on account or in any way growing out of the accident of Friday, June 01, 2001.

Dated this 21st day of ~~January~~ March, 2002.

STEGALL & ASSOCIATES

By _____
Leonard E. McGee
Attorney for Respondent

Dated this 5 day of ~~January,~~ Feb 2002.

SIEGFRIED & JENSEN

By _____
Preston L. Handy
Attorney for Claimant

B
Arbitrator's Award

ARBITRATION AWARD

Dixon Wong vs. Allstate UIM

An arbitration hearing was held in this case on May 16, 2002. After a review of the testimony submitted at the arbitration, including the written materials provided, and argument of counsel, I make the following comments, findings, and conclusions in this matter:

1. Liability for the automobile collision lies solely with Sherwood Glazier, the underinsured driver.

2. Mr. Wong suffered considerable and permanent injury as a direct and proximate result of the collision. Those injuries include:

a. Right calcaneus fracture. This is a very serious injury. I have personally heard this described in medical literature as the "blue collar man's retirement plan," because it effectively ends a blue collar worker's career. Both the treating orthopedic surgeon and the orthopedic IME describe the serious difficulties caused by this shattered calcaneus. Dr. Howe, (Allstate's IME doctor) describes a "poor" prognosis. He also opines that a subtalar fusion is probable.

Dr. Beals notes that calcaneus fractures "represent one of the worst injuries that trauma patients sustain." He also states: "I think most orthopedic surgeons if asked to list the injuries that they would never want to sustain themselves, this would probably make the top three." Finally, he states: "Calcaneus fractures are some of the most challenging injuries that humans sustain in terms of being able to resume work and avocation activities. . . It is my personal assessment that this is the single most disabling fracture that people have in the lower extremity in terms of the ability to maintain gainful employment throughout their career."

b. Left lower leg laceration and scar.

c. Chip fracture in his elbow. This is not an insignificant injury. Mr. Wong testified that this still hurts.

d. Facial abrasions and lacerations. These are still visible to me.

e. Left hand/fingers are still tingling. This, too, represents a significant injury. He remains symptomatic.

f. Headaches two to three times per week. Again, I am persuaded these headaches are legitimate and ongoing.

g. Numerous scars over many parts of his body.

3. I found Mr. Wong and his wife to be credible witnesses. My personal observation of Mr. Wong was that of a hard-working, active, and truthful person, who has done all he can to mitigate his damages and try to get well. I am persuaded that this injury has had a very dramatic and permanent effect on him and his family.

4. Based upon the foregoing, I believe the following damages were reasonably proved by the evidence:

a. Past medical expenses in the amount of $32,576.84. This amount was not challenged.

b. Future medical expenses in the amount of $22,000. This figure represents the cost of the hardware removal, and the cost of the anticipated subtalar fusion. There was some suggestion that these procedures could be combined; however, I do not believe there is reasonable evidence for me to consider that option. Moreover, the uncontroverted evidence was that both hardware removal and a subtalar fusion were likely.

c. Past lost wages in the amount of $6,800.

d. Future lost wages in the amount of $8,000.

e. Household services in the amount of $2,240.

f. There is no award for his inability to secure health insurance. Even though that may be a genuine hardship and economic loss for Mr. Wong, there was not enough evidence for me to make a specific award for that potential loss.

g. There is no specific award made for business losses. It is reasonable to assume a small business owner will suffer economic hardship if he is away from the business for an extended period of time. It seems reasonable

that he would suffer at least a temporary loss of business as a result of that absence. Nevertheless, there was insufficient evidence for me to make a specific award for those speculative losses.

h. General damages in the amount of $250,000. Mr. Wong walks with a permanent and painful limp. Both orthopedic surgeons agree this injury is awful. In addition to his calcaneus fracture, he has other serious injuries, including repeated headaches, left elbow pain, numbness and tingling into his left hand/fingers, and significant scarring. Finally, as mentioned above, I believe Mr. Wong's life has been severely and permanently altered. Aside from chronic daily pain, he has unquestioned limitation. Mr. Wong was a very active sportsman and hard worker. This award for general damages is reasonable, and perhaps conservative, given his prognosis.

5. In summary, Mr. Wong is awarded the following damages:

Past medical expenses	$ 32,576.84
Future medical expenses	22,000.00
Past lost wages	6,800.00
Future lost wages	8,000.00
Household services	2,240.00
General damages	250,000.00
Subtotal	$321,616.85
Liability coverages previously paid	$ 50,000.00
PIP benefits previously paid	10,690.00
Net amount awarded	$260,926.84

DATED this 20 day of May, 2002.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By _____
WARREN W. DRIGGS

wwd.520

C
Order Modifying Award

LYNN S. DAVIES [A0824]
CHRISTIAN S. COLLINS [A8452]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Petitioner
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALLSTATE INSURANCE COMPANY, Petitioner, vs. DIXON WONG, Respondent.	**ORDER GRANTING PETITIONER'S MOTION TO MODIFY ARBITRATOR'S AWARD** Civil No. 020905129 Judge William B. Bohling

Petitioner Allstate Insurance Company's Motion to Vacate Arbitrator's Award, or in the Alternative, Motion for Modification of Arbitrator's Award, came on regularly and pursuant to notice before the above-entitled court, the Honorable Judge William B. Bohling presiding, on October 31, 2002. Petitioner, Allstate Insurance Company, was represented by its counsel, Lynn S. Davies of Richards, Brandt, Miller & Nelson. Respondent, Dixon Wong, was present and represented by his counsel, Preston L. Handy of Siegfried & Jensen. The court had reviewed and considered all of the

memoranda, exhibits, and filings pertinent to that motion, as well as related motions. The court heard argument from counsel for petitioner and from counsel for respondent.

This case arises out of an underinsured motorist insurance policy, wherein Allstate Insurance Company was the insurer, and Dixon Wong was the insured. It is undisputed that the applicable insurance policy limits were in the amount of $100,000 for underinsured motorist coverage. Respondent, Mr. Wong, was involved in an automobile accident, and recovered policy limits from the insurer for the tortfeasor in that accident, in the amount of $50,000. Respondent, Mr. Wong, then made a claim against petitioner, Allstate Insurance Company, his own insurance carrier, for his underinsured policy limits. Those parties were unable to reach an agreement as to the settlement value of the claim, and therefore agreed to invoke the provision of the underinsured motorist policy providing for arbitration of the claim. The parties, through their attorneys, entered into an agreement entitled "Arbitration Agreement," signed respectively by counsel for respondent, Mr. Wong, on February 5, 2002, and by counsel for petitioner, Allstate Insurance Company, on March 21, 2002.

The parties, also through their attorneys, entered into a "Binding Arbitration Agreement" submitted to them by the arbitrator, Warren W. Driggs, on March 18, 2002, indicating that the "Nature of Dispute" was "Underinsured Motorist Claim - Damages." The matter was arbitrated on May 16, 2002. The arbitrator entered an award dated May 20, 2002, in the net amount of $260,926.84.

The court finds that the underinsured motorist policy constitutes a contract, and that the policy limits of $100,000 define the outer extent of exposure to petitioner, Allstate Insurance Company, on a claim for underinsured motorist benefits. An arbitration award in

excess of the $100,000 policy limits was beyond the reasonable expectations of the parties. The Arbitration Agreement did not operate to open or modify the terms of the insurance contract. In accordance with the applicable statute, Utah Code Ann. § 78-31a-14(1)(c)(1996), and applicable Utah case law, including Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941 (Utah 1996), and Soft Solutions, Inc. v. Brigham Young University, 2000 UT 46, ¶14, 1 P.3d 1095, the court finds that the arbitrator exceeded his authority and power by entering an award in excess of $100,000, that the award is beyond the reasonable contemplation of the parties, and that the award lacks adequate foundation in reason or fact. The court finds that the insurance policy limits of $100,000 constitute a contractual determination of the parties, which are not modified or altered by virtue of the arbitration agreements.

THEREFORE, IT IS HEREBY ORDERED that the arbitrator's award is hereby modified to conform to the policy limits of $100,000, this Order to constitute a judgment in said amount as requested in the alternative by petitioner. Therefore, this matter is resolved in favor of petitioner and against respondent.

MADE AND ENTERED this 16 day of Dec., 2002.

BY THE COURT:

/S/ WBB

THE HONORABLE WILLIAM B. BOHLING
PRESIDING

APPROVED AS TO FORM:

SIEGFRIED & JENSEN

_____

Preston L. Handy
Attorneys for Respondent

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